No. 90-92

In the Supreme Court of the United States

OCTOBER TERM, 1990

AMERICAN PETROLEUM INSTITUTE, PETITIONER

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals was permitted to discuss the statutory authority for the United States Environmental Protection Agency's decision to promulgate technology-based hazardous waste treatment standards, rather than risk-based standards, under Section 3004(m) of the Resource Conservation and Recovery Act of 1976, 42 U.S.C. 6924(m) (Supp. V 1987), prior to remanding the matter to EPA for a fuller explanation of the Agency's reasons for its regulatory action.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes and rule:

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-41a) is reported at 886 F.2d 355.

JURISDICTION

The opinion of the court of appeals entering judgment but staying issuance of the mandate was entered on September 15, 1989. EPA filed a response on February 12, 1990. Pet. App. 65a-77a. The court of appeals dismissed the petitions for review and directed the Clerk to issue a certified copy of the order in lieu of a fomal mandate on March 14, 1990.

Pet. App. 42a-43a. On June 4, 1990, Chief Justice Rehnquist granted petitioner an extension of time within which to file a petition for a writ of certiorari to and including July 12, 1990. The petition was filed on July 12, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case involves a decision by the United States Environmental Protection Agency (EPA) concerning appropriate treatment standards for certain hazardous wastes. Pet. App. 45a-48a. Petitioner does not challenge the court of appeals' decision to remand the treatment standards issue to EPA. Rather, petitioner complains that the court of appeals provided too much guidance to the Agency, thereby improperly influencing EPA's explanation on remand.

1. Congress enacted the Resource Conservation and Recovery Act of 1976 (RCRA), Pub. L. No. 94-580, 90 Stat. 2795, 42 U.S.C. 6901 *et seq.*, to address the increasingly serious environmental and health dangers arising from waste generation, management, and disposal. Of particular concern to Congress was the safe management and disposal of hazardous wastes. See H.R. Rep. No. 1491, 94th Cong., 2d Sess. 2, 3 (1976). Under RCRA, EPA is required to identify solid wastes that are subject to regulation as hazardous wastes and to promulgate performance standards applicable to the generators and transporters of hazardous wastes, as well as to the owners and operators of facilities engaged in the treatment, storage, and disposal of hazardous wastes. 42 U.S.C. 6921-6924 (1982 & Supp. V 1987). See *United Technologies Corp.* v. *EPA*, 821 F.2d 714, 716 (D.C. Cir. 1987).

With the enactment of The Hazardous and Solid Waste Amendments of 1984, Pub. L. No. 98-616, 98 Stat. 3221, Congress comprehensively amended RCRA. A major goal of the 1984 amendments was to reduce land disposal of hazardous wastes. Accordingly, Congress amended Section 3004 of RCRA, to require EPA to promulgate land disposal prohibitions with respect to all hazardous wastes, pursuant to a phased schedule established by Congress. 42 U.S.C. 6924 (Supp. V 1987). In general, the more hazardous a waste, the earlier its land disposal prohibitions take effect. EPA's first deadline under the amended statute was to promulgate regulations governing the land disposal of hazardous wastes containing solvents and dioxins by November 8, 1986. See Section 3004(e) of RCRA, 42 U.S.C. 6924(e) (Supp. V 1987).

The amended Section 3004, however, permits land disposal of wastes under either of two conditions:

First, hazardous waste may be disposed of on land if it meets treatment standards established by EPA pursuant to Section 3004(m) of RCRA, 42 U.S.C. 6924(m) (Supp. V 1987). See 42 U.S.C. 6924(k) (Supp. V 1987) (definition of "land disposal"). Under Section 3004(m)(1), EPA must establish levels or methods for the treatment of hazardous wastes "which substantially diminish the toxicity of the waste or substantially reduce the likelihood of migration of hazardous constituents from the waste so that short-term and long-term threats to human health and the environment are minimized." 42 U.S.C. 6924(m)(1) (Supp. V 1987). If a hazardous waste has been treated to the levels specified in the treatment standards (or otherwise meets those standards), the waste will not be subject to the RCRA

land disposal prohibitions. 42 U.S.C. 6924(m)(2) (Supp. V 1987).

Second, the Administrator of EPA may determine that a land disposal prohibition "is not required in order to protect human health and the environment for as long as the waste remains hazardous." 42 U.S.C. 6924(d)(1) and (e)(1) (Supp. V 1987); see also 42 U.S.C. 6924(g)(5) (Supp. V 1987).

2. On November 7, 1986, EPA published its first set of land disposal prohibitions under the 1984 amendments to RCRA. 51 Fed. Reg. 40,572-40,654. The regulations implement the Section 3004(e) land disposal prohibitions for solvent and dioxin-containing wastes and establish treatment standards for those wastes. In addition, EPA established certain "framework" provisions that would apply to solvent and dioxin wastes, as well as to all hazardous wastes whose land disposal is subsequently prohibited.

a. EPA initially proposed an approach for setting treatment standards under Section 3004(m) of RCRA that would use technology-based standards with risk-based screening levels. Pet. App. 49a-64a. Under the proposal, the Agency would determine the concentration levels of hazardous constituents in a waste that could be achieved by using the "best demonstrated achievable (or available) technology" (BDAT). Pet. App. 53a. In addition, EPA would determine a protective level for the hazardous constituent in the waste. If the risk-based screening level were higher (*i.e.*, less stringent) than the BDAT level, tme risk-based level would become the treatment standard. Otherwise, the technology-based level would become the treatment standard, provided that the technology resulted in substantial reductions of toxicity and mobility of the hazardous constituents and did not pose greater risks than land disposal.

In the notice of proposed rulemaking, EPA sought comment on an alternative approach to setting treatment standards. Pet. App. 62a-63a. Under the alternative approach, treatment standards would be based solely on the performance of BDAT.

b. Several commenters on the proposed rule disagreed with EPA's tentative determination to employ risk-based screening levels in establishing treatment standards. They maintained that the express purpose of the 1984 amendments was to avoid the scientific uncertainty inherent in risk-based determinations regarding land disposal. In addition, they sharply criticized the predictive models that EPA had proposed to use to establish risk-based levels. Congress held oversight hearings at which these criticisms of the proposed rule were reiterated. See *Resource Conservation and Recovery Act Amendments of 1984: Oversight Hearing on H.R. 3917 Before the Subcomm. on Environmental Pollution of the Senate Comm. on Environment and Public Works*, 99th Cong., 2d Sess. (1986).

c. In the final rule, published November 7, 1986, EPA decided to base its treatment standards exclusively on the performance of BDAT. Pet. App. 45a-48a. The Agency alluded to the intense criticism of its proposed use of risk-based screening levels, finding that the approach of relying exclusively upon technology-based treatment standards better mirrors congressional intent.

3. Several parties filed timely petitions for review of various aspects of the November 7, 1986 rule. Chemical Manufacturers Association (CMA) challenged EPA's adoption of technology-based treatment standards, arguing that those standards were not based upon a reasonable interpretation of RCRA.

Pet. App. 11a. Petitioner, an intervenor in the court of appeals proceeding, raised the additional claim that EPA's explanation for its decision was inadequate. *Ibid.*

The court of appeals addressed these arguments in turn, in a *per curiam* opinion. Employing the two-step analysis of *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837, 842-845 (1984), the court first determined that RCRA did not unambiguously require EPA to promulgate treatment standards employing risk-based screening levels. Pet. App. 12a-14a. Moving to "Step II" of the *Chevron* analysis, the court determined that the promulgation of technology-based treatment standards was consistent with a reasonable interpretation of the statute. *Id.* at 14a-17a. Specifically, the court of appeals rejected CMA's arguments that the hazardous waste treatment standards were required to correspond with maximum contaminant levels for drinking water established by the Safe Drinking Water Act (42 U.S.C. 300f *et seq.* (1982 & Supp. V 1987)), organic toxicity characteristic levels, or hazardous waste delisting levels promulgated by EPA under different statutory criteria. *Ibid.* The court acknowledged that it made this determination based upon EPA's "Initial Rule document" and the Agency's briefs. Pet. App. 17a.

Having thus determined that EPA had shown technology-based treatment standards to be consistent with a reasonable interpretation of the statute, the court of appeals turned to petitioner's argument that EPA had not adequately explained its reasons for adopting those standards in the final rule, rather than the alternative approach—also seemingly reasonable in the court's view, see Pet. App. 17a—reflected in the proposed rule. *Id.* at 17a-22a. Citing

Motor Vehicle Mfrs. Ass'n v. *State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983), and *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947), for the proposition that a court "may not supply a reasoned basis for the agency's action that the agency itself has not given," the court of appeals parsed the language accompanying EPA's final rule. Pet. App. 18a. In so doing, the court concluded that petitioner was correct: EPA had not adequately explained its reasons for moving from its initial proposal to a final rule establishing treatment standards based solely on BDAT. The court speculated that the rationale for EPA's decision may have been found in the uncertainties of risk-based standards, as outlined in the proposed rule, or in the comments of those who objected to the proposed rule. *Id.* at 22a. Since, however, EPA's intended rationale was "shrouded in mist" (*ibid.*), the court of appeals granted the petition for review and remanded the matter for EPA to withdraw the rule or "clarify its reasons for adopting the Final Rule in preference to the Proposed Rule." *Id.* at 34a.

In a concurring opinion, Judge Silberman faulted the methodology of the majority's *per curiam* opinion but not its result. Pet. App. 34a-41a. Judge Silberman concluded that it was "inappropriate" for the majority to undertake a *Chevron* Step II analysis in order to decide the CMA issue prior to remanding the case for a further statement of reasons from EPA. Pet. App. 35a. Consequently, Judge Silberman viewed the majority's discussion upholding the reasonableness of technology-based standards under the statute as "*dicta*" (*ibid.*) and an "advisory opinion" (*id.* at 39a).

4. EPA asked for and was granted a 45-day extension of time to consider an appropriate response

to the remand order. The agency "directly solicited comment from all of the parties to the litigation, received their written (and, in some cases, oral) comments and considered these comments" in preparing a response. Pet. App. 76a-77a. EPA then published and submitted to the court a lengthy explanation for its decision to promulgate technology-based treatment standards, rather than risk-based standards. *Id.* at 65a-77a. In the course of its discussion, the Agency explained that its ultimate objective was to require treatment of hazardous wastes only to the level at which the wastes could no longer be considered hazardous to human health and the environment. *Id.* at 68a. EPA added, however, that technological uncertainties precluded it from promulgating such risk-based standards at the present time. *Id.* at 68a-69a. Analyzing the language and legislative history of Section 3004(m) of RCRA, EPA concluded that the promulgation of technology-based treatment standards was consistent with congressional intent. The Agency also noted that since the promulgation of the rule in question in 1986, EPA had abandoned as technically flawed the predictive model on the basis of which it had originally proposed to establish risk-based standards. Pet. App. 74a.

EPA filed its "response to court remand" with the court of appeals on February 12, 1990, and requested dismissal of the petitions for review. See Pet. App. 65a-77a. None of the other parties to the case submitted a response to the EPA filing. On March 14, 1990, the court dismissed the petitions for review and issued an order in lieu of a formal mandate. *Id.* at 42a-43a. Petitioner filed a separate petition for review of the EPA's notice of compliance, and that pe-

tition is currently pending before the D.C. Circuit. *American Petroleum Institute* v. *EPA*, No. 90-1268.

ARGUMENT

The court of appeals faithfully applied settled administrative law doctrine embodied in the *Chenery* opinion when, in response to petitioner's argument, it remanded the rulemaking to EPA for a further explanation of the Agency's decision to promulgate technology-based treatment standards. Nevertheless, petitioner contends that the court of appeals, by discussing this issue in the context of rejecting CMA's arguments, imposed upon EPA "the court's post-hoc rationale" for the agency's final rule. Pet. 15. In advancing this contention, petitioner attempts to portray a fact-bound, case-specific set of circumstances as a new principle of administrative law. Nothing in the court of appeals' decision supports petitioner's view that the case represents a departure from this Court's precedents. Moreover, this case does not present a conflict with the decision of any other court of appeals.

1. The only unusual aspect of this case is that the court of appeals (addressing an argument raised by CMA) first determined that the statute does not preclude the adoption of technology-based treatment standards, but then (addressing an argument raised by petitioner) concluded that EPA's explanation for its choice of technology-based standards was inadequate. Petitioner, like Judge Silberman, would reverse these two steps of the court of appeals' decisionmaking process. It contends that the court, having found EPA's explanation to be inadequate, was required to decline to address the statutory construc-

tion argument. Under this approach, as Judge Silberman points out, any discussion of the reasonableness of EPA's choice under the governing statute could be construed as *dictum*, rather than as a holding on the separate issue presented by CMA.

Even if we assume, *arguendo*, that Judge Silberman is correct in this regard—a proposition we do not concede—it does not follow that the court of appeals deviated from settled principles of administrative law. Neither *Chenery* nor any other decision of this Court prohibits a court of appeals from offering views that may not be essential to the holding of a case. While the discussion preceding the remand order may not have been necessary, the court of appeals surely did not depart from the accepted and usual course of judicial proceedings in any significant way. See Sup. Ct. R. 10.1(a).

2. Petitioner's contention that the court of appeals improperly constrained EPA's discretion on remand is a factual argument not borne out by the record in this case. Petitioner maintains that the court of appeals supplied its own "post-hoc rationale" for EPA's decision to adopt technology-based treatment standards. Pet. 15. The court itself disputes this point, stating that its discussion was based on both record material and the briefs submitted by EPA. Pet. App. 17a. Even if there were reason to doubt the court of appeals' own characterization of the bases of its opinion, however, such a tangential dispute would not warrant review by this Court.

Furthermore, there is no factual or legal support for petitioner's claim that EPA felt compelled to "parrot[] the court's logic" in issuing its response to the court's remand order. Pet. 14. The remand order explicitly gave EPA a choice about how to proceed,

instructing the Agency that it could "*either* withdraw the Final Rule *or* publish an adequate statement of basis and purpose." Pet. App. 34a (emphasis added). Had EPA felt improperly constrained by the court's opinion, it could have sought further review or rehearing to protect its own administrative authority. In fact, however, the Agency instead responded to the remand order with a lengthy document that discussed EPA's long-term policy goals for setting hazardous waste treatment standards. See *id.* at 67a-69a. The response ranged far beyond the discussion of statutory authority found in the court of appeals' decision. No purpose would be served by further review of this case simply to compare the court of appeals' opinion with EPA's decision on remand.

3. Indeed, petitioner does not seek meaningful relief from this Court. The court of appeals' opinion itself *granted* substantially the relief petitioner sought—remand to EPA for further proceedings to reconsider or further explain the reasons underlying adoption of the technology-based treatment standards. The Agency, in turn, chose to publish a revised explanation. Apparently, petitioner now seeks to have this Court vacate what, in its view, is unfavorable *dicta* accompanying an otherwise favorable decision. See *Black* v. *Cutter Laboratories*, 351 U.S. 292, 297 (1956) (Court "reviews judgments, not statements in opinions"); see also, *e.g.*, *California* v. *Rooney*, 483 U.S. 307, 311 (1987) (per curiam); *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837, 842 (1984); *Williams* v. *Norris*, 25 U.S. (12 Wheat.) 117, 120 (1827). Petitioner would then have the matter remanded to EPA, which would once more be required to withdraw or explain its decision to choose technology-based standards over risk-based standards. See

Pet. 16. There is no reason to believe that such a second remand would accomplish any useful purpose, even if the Agency could expunge all traces of the court of appeals' decision from its memory.

4. Finally, recent decisions of the D.C. Circuit belie petitioner's contention that the court of appeals' decision in this case "will be influential because it provides the court with discretionary authority to influence, if not control, the substantive decisions of federal regulatory agencies." Pet. 17. For example, in a recent RCRA decision, the D.C. Circuit faithfully adhered to the administrative law principles of *Chenery* and *State Farm*:

> We are constrained to remand to the agency for a fuller explanation * * *.
>
> In reaching this conclusion we do not attempt to substitute our judgment for the expert judgment of the agency. * * * [W]e cannot, consistently with our limited role in reviewing agency decisions, adduce the relevant material and reach the reasoned decision ourselves; that task remains to be done by the agency.

American Mining Congress v. *EPA*, No. 88-1835 (D.C. Cir. July 10, 1990), slip op. 22.

Similarly, in another recent decision remanding a matter to EPA for a more detailed explanation, the court pointedly emphasized that the court was not prejudging the merits of the case:

> Our decision today implies no conclusion as to the merits * * *. EPA may respond with a range of possible arguments * * *.

NRDC, Inc. v. *Administrator, EPA*, 902 F.2d 962, 988 (D.C. Cir. 1990), petition for cert. pending, No. 90-257. Similar discretion on remand was recently

provided to EPA in yet another recent D.C. Circuit decision. *NRDC, Inc.* v. *EPA*, No. 88-1657 (D.C. Cir. June 29, 1990), slip op. 37.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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* The Solicitor General is disqualified in this case.

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